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IN THE
Supreme Court of the United States
OCTOBER TERM, 1992

IN RE ATLANTIC RICHFIELD COMPANY,
Petitioner.

Petition for a Writ of Mandamus to the United States Court of Appeals for the Ninth Circuit and the Honorable Dorothy W. Nelson and Stephen Reinhardt, Judges, United States Court of Appeals for the Ninth Circuit

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PETITION FOR A WRIT OF MANDAMUS

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QUESTIONS PRESENTED

In *Atlantic Richfield Co. v. USA Petroleum Co.*, 495 U.S. 328, 346 (1990), this Court held that plaintiff USA Petroleum Company ("USA Petroleum") "has failed to demonstrate that it has suffered any antitrust injury." On that basis, this Court reversed a decision by two judges of the Ninth Circuit (Dorothy W. Nelson and Stephen Reinhardt). On remand, the same two Ninth Circuit judges blatantly refused to follow this Court's holding. They instead ruled that USA Petroleum's antitrust case can proceed to trial, occasioning a dissent by Judge Arthur L. Alarcon explaining that he could not join the majority because "[m]y oath of office requires me to follow the mandate of the Supreme Court." 972 F.2d 1070, 1077 (9th Cir. 1992). The decision on remand presents the following questions reviewable by mandamus:

> Whether the Ninth Circuit's decision on remand mistakes or misconstrues the decree of this Court or refuses to give effect to this Court's mandate in either of the following respects:
>
> a. Whether the Ninth Circuit's decision allowing USA Petroleum another chance to demonstrate that it suffered antitrust injury improperly reopens an issue disposed of by this Court's holding "that respondent has failed to meet the antitrust injury test in this case." 495 U.S. at 335.
>
> b. Whether the Ninth Circuit's decision allowing USA Petroleum to prove antitrust injury through pricing that is not predatory under §2 of the Sherman Act impermissibly conflicts with this Court's explicit rejection of USA Petroleum's argument "that it has suffered antitrust injury even if [its] pricing was not predatory under §2 of the Sherman Act." 495 U.S. at 339.

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
TABLE OF AUTHORITIES	iv
PRIOR OPINIONS	1
JURISDICTION	2
STATUTES INVOLVED	2
STATEMENT OF THE CASE	3
Proceedings In The District Court	4
The Initial Ninth Circuit Decision	7
This Court's Decision	7
Proceedings In The Ninth Circuit On Remand	9
REASONS FOR GRANTING THE WRIT	11
THE DECISION ON REMAND CONFLICTS WITH THIS COURT'S DECISION IN THIS CASE	11
A. The Ninth Circuit Decision Does Not Give Effect To This Court's Holding That USA Petroleum Failed To Meet The Antitrust-Injury Test	12
B. The Ninth Circuit Decision Does Not Give Effect To This Court's Statements That Antitrust Injury In a Sherman Act § 1 Case Can Be Inflicted On A Competitor Only By Pricing That Is Predatory Under Sherman Act § 2	15
CONCLUSION	18

TABLE OF AUTHORITIES

CASES Page

Atlantic Richfield Co. v. USA Petroleum Co., 495 U.S. 328 (1990) ..... *passim*
Cargill, Inc. v. Monfort of Colorado, Inc., 479 U.S. 104 (1986) 15
General Atomic Co. v. Felter, 436 U.S. 493 (1978) 12
Liggett Group, Inc. v. Brown & Williamson Tobacco Corp., 964 F.2d 335 (4th Cir.), *cert. granted*, 113 S. Ct. 430 (1992) (No. 92-466) 2, 4, 11, 15
Matsushita Electric Industrial Co. v. Zenith Radio Corp., 475 U.S. 574 (1986) 15
NAACP v. Alabama, 360 U.S. 240 (1959) 13-14
USA Petroleum Co. v. Atlantic Richfield Co., 859 F.2d 689 (9th Cir. 1989) 2, 7
USA Petroleum Co. v. Atlantic Richfield Co., 972 F.2d 1070 (9th Cir. 1992) ..... *passim*

STATUTES

Clayton Act § 4 (15 U.S.C. § 15) 2, 6, 9
Sherman Act § 1 (15 U.S.C. § 1) ..... *passim*
Sherman Act § 2 (15 U.S.C. § 2) ..... *passim*
28 U.S.C. § 1651(a) 2

OTHER AUTHORITY

R. Stern, E. Gressman and S. Shapiro, *Supreme Court Practice* (6th ed. 1986) 12

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PETITION FOR A WRIT OF MANDAMUS

Petitioner Atlantic Richfield Company ("ARCO") respectfully requests that a writ of mandamus issue to review the judgment and decision of the Court of Appeals for the Ninth Circuit filed on August 12, 1992, and the order of the Ninth Circuit filed on March 17, 1993, which effectively denied ARCO's request for rehearing to the extent that request was based upon the remand decision's inconsistency with this Court's mandate.

PRIOR OPINIONS

The opinion of this Court is reported at 495 U.S. 328 and appears as Appendix A to this Petition. The opinion of the Court of Appeals on remand is reported at 972 F.2d 1070 and appears as Appendix B to this Petition. The March 17, 1993 order of the Court of Appeals on

ARCO's petition for rehearing appears as Appendix C to this Petition. The initial opinion of the Court of Appeals is reported at 859 F.2d 687 and appears as Appendix D to this Petition. The District Court's unreported ruling granting ARCO summary judgment appears as Appendix E to this Petition.[1]

JURISDICTION

The Court of Appeals entered its judgment in this case on August 12, 1992. ARCO filed a timely petition for rehearing and suggestion for rehearing *en banc* on August 26, 1992. On March 17, 1993, Judges Nelson and Reinhardt of the Court of Appeals ordered that the petition be withdrawn from submission pending this Court's decision in *Liggett Group Inc. v. Brown & Williamson Tobacco Corp.*, No. 92-466 ("*Liggett*"). This Court has jurisdiction to review the judgment and order of the Court of Appeals by writ of mandamus pursuant to 28 U.S.C. §1651(a).

STATUTES INVOLVED

Section 4 of the Clayton Act, 15 U.S.C. §15, provides in relevant part:

> "Any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor . . . and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee."

Section 1 of the Sherman Act, 15 U.S.C. §1, provides in relevant part:

> "Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce . . . is declared to be illegal . . . ."

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[1] Pursuant to Rule 29.1 of the Rules of the Supreme Court, ARCO submits as Appendix F a list of its non-wholly owned subsidiaries. All of the appendices appear in a separately bound appendix.

STATEMENT OF THE CASE

The Ninth Circuit's decision on remand is significantly more important than that court's first decision, which this Court reversed in *Atlantic Richfield Co. v. USA Petroleum Co.*, 495 U.S. 328 (1990) ("*Atlantic Richfield*"). The first decision raised an important issue of antitrust law and policy, which this Court resolved by "declin[ing] to dilute the antitrust injury requirement . . . because we find that there is no need to encourage private enforcement by competitors of the rule against vertical, maximum price-fixing." 495 U.S. at 345. The second decision implicates all of the same, and other equally important, issues.[2] But, far eclipsing the underlying issues in importance is the utter disregard that Judges Nelson and Reinhardt show in the remand decision for this Court's opinion. They disregard both this Court's ultimate holding that "respondent has failed to meet the antitrust injury test in this case" (495 U.S. at 335) and this Court's explicit rejection of the very same argument that these Ninth Circuit judges now incredibly accept on remand. 495 U.S. at 339. Their disregard of this Court's decision is so manifest that the dissenting judge, Judge Alarcon, explained that he could not join Judges Nelson and Reinhardt because his "oath of office requires [him] to follow the mandate of the Supreme Court." 972 F.2d at 1077.

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[2] In addition to the questions presented by this mandamus petition, the decision on remand presents two important issues, which, if not rendered moot by this petition or by the Ninth Circuit on rehearing, could be reviewed on a later writ of certiorari:

1. Whether a firm can engage in predatory pricing when its market share is not large enough to create a reasonable likelihood that it will recover in the form of later monopoly profits more than the losses suffered through predatory pricing.

2. Whether the district court correctly granted summary judgment when USA Petroleum failed to make any showing on an essential element of its case (here, predatory pricing) that ARCO contended could not be proven and with respect to which USA Petroleum would have had the burden of proof at trial, but instead argued unsuccessfully that the law did not require the element.

ARCO sought rehearing and requested rehearing *en banc* because, among other reasons, the decision on remand patently disregarded this Court's mandate. By an extraordinary order filed on March 17, Judges Nelson and Reinhardt (with Judge Alarcon again dissenting) effectively rejected ARCO's argument that there was any inconsistency. (Appendix C.) Their order, by its terms, defers decision on ARCO's petition pending this Court's decision in *Liggett*. *Liggett*, however, is utterly irrelevant to ARCO's fundamental argument that these judges disregarded the Court's mandate. This simple fact makes clear that Judges Nelson and Reinhardt already have rejected ARCO's argument that this Court definitively disposed of USA Petroleum's showing on antitrust injury. They are using the vehicle of a deferral order to prevent review of their decision. This Court, however, has ample power to review by writ of mandamus the failure of these judges to follow its mandate.

Proceedings In The District Court

USA Petroleum brought this lawsuit to attack ARCO's marketing program, commenced in April 1982, under which ARCO discontinued credit cards and otherwise reduced its costs so that it could become more competitive through lower gasoline prices to the consumer. USA Petroleum's complaint alleged that ARCO implemented "severe and predatory price cuts" designed to drive USA Petroleum and other independent gasoline marketers out of the market. (Joint Appendix ("JA") 18, ¶28.)[3] USA Petroleum further alleged that ARCO's predatory pricing was intended to, and posed a danger that ARCO would, obtain control of a purported "discount market" for gasoline. (JA 20, ¶39.) USA Petroleum cast its predatory pricing claim principally as a

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[3] The Joint Appendix is that filed by ARCO and USA Petroleum when this case was initially before this Court on writ of certiorari (No. 88-1668).

Sherman Act §2 attempt-to-monopolize case. But, USA Petroleum also alleged price-fixing in violation of Sherman Act §1, because much of the gasoline sold in competition with USA Petroleum was not sold directly by ARCO, but by independent dealers with whom it allegedly conspired to charge predatory prices.

After three years of discovery, ARCO moved for summary judgment dismissing the Sherman Act §1 and §2 claims. The motion was based upon an extensive factual record showing that ARCO and its dealers could not engage in predatory pricing because they posed no real threat of acquiring monopoly power in any relevant market. ARCO argued that USA Petroleum's inability to prove predatory pricing precluded it from proving both a violation of §2 and the antitrust injury required for its §1 claim. Confronted by the motion, USA Petroleum promptly stipulated to dismiss with prejudice its Sherman Act §2 claim. (JA 76.)

ARCO then renewed its summary judgment motion directed to the §1 claim. ARCO argued that USA Petroleum could not satisfy the antitrust-injury requirement without proving predatory pricing and that it could not prove predatory pricing. ARCO offered both a legal principle and a factual showing to support the latter argument. ARCO's legal principle was that predatory pricing can occur only where the defendant has a market share large enough to threaten future monopoly prices. ARCO's factual showing established that its market share was far too low to enable it to engage in predatory pricing.

USA Petroleum decided that it would not even try to prove predatory pricing in its opposition to the summary judgment motion. Rather, USA Petroleum decided to rest its entire opposition on the argument that it was not required to prove predatory pricing to establish antitrust injury. USA Petroleum manifested this decision in a number of ways. First, its opposition to ARCO's motion

offered neither legal authorities, nor a factual record, to challenge the contention that USA Petroleum could not prove predatory pricing. Second, USA Petroleum's Statement of Genuine Issues, required under the Local Rules of the District Court to set forth "all material facts as to which it is contended there exists a genuine issue necessary to be litigated," did not identify as disputed any issue relating to predatory pricing. (JA 86-7.) Rather, it identified as the only two disputed issues: (1) whether ARCO engaged in vertical price fixing and (2) whether that price fixing injured USA Petroleum and in what amount. (*Id.*) Third, USA Petroleum's counsel at the summary judgment hearing candidly acknowledged his belief "that there is no dangerous probability of monopolization and *therefore* the idea that this price is predatory . . . even by the most liberal standard, is probably going to fail." (10/14/86 Tr. 19 (emphasis added).)[4]

The District Court rejected USA Petroleum's argument. It held: "Even assuming that the plaintiff can establish a vertical conspiracy to maintain low prices, the plaintiff cannot satisfy the antitrust injury requirement of Clayton Act §4, without showing such prices to be predatory." (Appendix E, ¶5.) Based upon the factual record submitted by ARCO and USA Petroleum's concessions, the District Court further found that "no such showing [*i.e.*, that ARCO prices were predatory] can be made."

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[4] As demonstrated by counsel's use of the word "therefore" to link together the concepts of dangerous probability of monopolization and predatory pricing, USA Petroleum then recognized that it could challenge ARCO's showing on predatory pricing only by proving that ARCO posed a real threat of acquiring monopoly power. Knowing the impossibility of making such a showing where ARCO had at most a 17% market share, USA Petroleum abandoned its predatory pricing claim. Moreover, USA Petroleum then was confident that the courts would reject ARCO's argument that antitrust injury required USA Petroleum to prove predatory pricing, an argument its opposition described as "frivolous," "contrived" and "unprecedented." (Plaintiff's Opposition to Defendant's Motion for a Pretrial Order, at 3, 6.)

(*Id.*) Accordingly, the District Court granted ARCO summary judgment dismissing the §1 claim.

The Initial Ninth Circuit Decision

In its initial appeal to the Ninth Circuit, USA Petroleum maintained the same position on predatory pricing it had asserted below. Its Opening Brief in the Ninth Circuit, at page 1, identified as the "sole issue" on appeal whether losses from *per se* unlawful maximum price fixing constituted antitrust injury. USA Petroleum's Opening Brief, at page 6, also candidly acknowledged that it had "offered no proof on predatory pricing or dangerous probability of monopolization" in the district court. As a result, both the majority and dissenting opinions in the Ninth Circuit identified as the sole issue on appeal "whether in the absence of predatory pricing a competitor can recover damages because of a maximum resale price agreement." 859 F.2d at 689 (majority); *see* 859 F.2d at 698 (dissent).

Both opinions described this antitrust-injury issue as "difficult" and of "first impression" within the Ninth Circuit. *Id.* at 689, 698. The majority, Judges Nelson and Reinhardt, upheld USA Petroleum's position that the antitrust-injury test did not require it to prove predatory pricing. The dissent, Judge Alarcon, believed that USA Petroleum's inability (or at least unwillingness) to prove predatory pricing was fatal, because a competitor's loss of profits from vigorous, but nonpredatory, competition was not antitrust injury.

This Court's Decision

On April 7, 1989, ARCO sought review from this Court. The petition for certiorari presented a single question—whether USA Petroleum's losses from nonpredatory vertical, maximum price fixing amounted to antitrust injury.

In its brief in opposition to certiorari, USA Petroleum for the first time since the filing of the summary judgment motion contended that ARCO's prices might be predatory.

USA Petroleum further contended that the district court had not made the foundational finding that ARCO's prices were nonpredatory. USA Petroleum used these contentions to argue that the question presented was not ripe for this Court's review. (Brief In Opposition To Petition For Writ Of Certiorari, 14-15.) In its reply on certiorari, ARCO showed that the ripeness issue was a red herring. Citing the history discussed above, ARCO demonstrated that: (1) USA Petroleum had abandoned its predatory pricing claim after the filing of the summary judgment motion; (2) the district court, having been presented with no evidence to the contrary, had found that USA Petroleum could not prove predatory pricing; and (3) USA Petroleum had failed to challenge the district court's finding on appeal in the Ninth Circuit. (Reply Brief In Support Of Petition For Writ Of Certiorari, 6-8.) ARCO argued that the record foreclosed USA Petroleum from challenging the district court's finding in a future proceeding and therefore allowed this Court to "assume," as the Ninth Circuit had assumed, "that the challenged prices were not predatory." (*Id.* at 6.)

This Court granted the petition for certiorari in order to resolve a conflict between the Seventh and Ninth Circuits. 490 U.S. 1097 (1989). USA Petroleum's brief on the merits did not repeat the contention, previously made only in the opposition to certiorari, that ARCO's prices were predatory. Instead, USA Petroleum reverted to the position it had asserted in the Ninth Circuit, arguing that it did not need to prove predatory pricing. Its brief identified as a question presented: "must a competitor prove, in order to demonstrate antitrust injury, that the pricefixers . . . had a dangerous probability of successful monopolization in the interbrand market under a Sherman Act §2 standard?"

This Court reversed the Ninth Circuit. 495 U.S. 328 (1990). It ruled that a firm that "loses sales to a competitor charging nonpredatory prices pursuant to a vertical, maximum price-fixing scheme" "does not suffer an 'anti-

trust injury' and . . . therefore cannot bring suit under §4 of the Clayton Act . . . ." 495 U.S. at 331.[5] The Court applied this ruling explicitly to hold that USA Petroleum "has failed to meet the antitrust-injury test in this case" and "has failed to demonstrate that it has suffered any antitrust injury." 495 U.S. at 335, 346. This Court also directly addressed USA Petroleum's question presented—whether Sherman Act §2 standards for proving predatory pricing, such as dangerous probability of successful monopolization, should govern the antitrust injury inquiry in a §1 case. *See* p. 8 above. The Court rejected USA Petroleum's position:

> "In sum, respondent maintains that it has suffered antitrust injury even if petitioner's pricing was not predatory under §2 of the Sherman Act.
>
> We reject respondent's argument."

495 U.S. at 339. The Court reversed the judgment of the Ninth Circuit and "remanded for proceedings consistent with this opinion." *Id.* at 346.

Proceedings In The Ninth Circuit On Remand

USA Petroleum sought neither rehearing nor clarification in this Court. Instead, it filed with the Ninth Circuit a "motion for clarification," asking that court again to reverse the district court's summary judgment. The motion essentially repeated the argument, which this Court had rejected, that Sherman Act §2 concepts have no place in a Sherman Act §1 case. However, USA Petroleum recanted its prior position that predatory pricing and dangerous probability of monopolization went hand-in-hand and were both §2 concepts that had no place in a §1 case. USA Petroleum now argued that predatory pricing could exist without dangerous probabil-

[5] This Court was able to "assume that petitioner's pricing was not predatory in nature" (495 U.S. at 333 n.3) because the district court had so found and USA Petroleum had not challenged that finding in the Ninth Circuit.

ity. It asked for permission to return to the district court to try to prove this new type of predatory pricing.

Judges Nelson and Reinhardt again reversed the district court's summary judgment. 972 F.2d at 1076. By rewriting this Court's holding that "respondent has failed to meet the antitrust injury test in this case," they stated that "the Supreme Court has held that USA has standing . . . to pursue a predatory pricing claim. . . ." 972 F.2d at 1074. By distorting the record, they found that USA Petroleum had not abandoned its predatory pricing allegations in the district court and in its opening brief in the Ninth Circuit. *Id.* at 1073-74. Finally, by ignoring this Court's explicit rejection of USA Petroleum's argument "that it has suffered antitrust injury even if petitioner's pricing was not predatory under §2 of the Sherman Act," they ruled that USA Petroleum did not need to prove predatory pricing violative of §2 because "[t]o require such a showing would be tantamount to saying that a conspiracy to predate violates section 1 only if it also violates section 2." *Id.* at 1076. Based upon these rulings, they remanded to allow USA Petroleum to prove predatory pricing. However, they provided no guidance beyond stating that a predatory price is a price "below 'some appropriate measure of cost' " (972 F.2d at 1071 n.1) and suggesting that a price could be predatory "without regard to its actual or potential market effect." *Id.* at 1076.

Judge Alarcon, again in dissent, reviewed this Court's opinion and the record establishing USA Petroleum's abandonment of its predatory pricing claim. He concluded:

> "The Supreme Court ruled in a landmark decision that Judge Nelson and Judge Reinhardt erred in holding that USA had demonstrated antitrust injury on the record presented to the district court. *The same judges, after again reviewing the same record, have refused to carry out the Supreme Court's mandate.*"

972 F.2d at 1083 (emphasis added). Judge Alarcon would carry out "the mandate of the United States Supreme Court [by entering] a brief order affirming the district court's order." *Id.* at 1076.

ARCO filed a petition for rehearing and suggestion that the rehearing be *en banc*. The principal ground for the petition was that the decision on remand conflicted with the Court's mandate in *Atlantic Richfield*. ARCO also argued that the decision on remand had incorrectly defined predatory pricing, citing (among other cases) the Fourth Circuit's opinion in *Liggett* (964 F.2d 335 (4th Cir.), *cert. granted*, 113 S. Ct. 430 (1992)), and that the decision was inconsistent with prevailing summary judgment law. Incredibly, seven months after ARCO filed its petition, in another attempt to frustrate the mandate of this Court, Judges Nelson and Reinhardt, with Judge Alarcon again dissenting, issued an order withdrawing the "case" "from submission pending a decision from the Supreme Court in *Liggett*." (Appendix C.) Their citation to *Liggett* shows their rejection of ARCO's principal ground for seeking rehearing because nothing in that case possibly could have any relevance to the fundamental issue whether the decision on remand conflicts with this Court's *Atlantic Richfield* opinion. The order, however, effectively precludes review of that decision either by the Ninth Circuit *en banc* or by this Court on a petition for certiorari. In these circumstances, mandamus is the only form of relief that ARCO may seek and should be granted for reasons demonstrated below.

REASONS FOR GRANTING THE WRIT

THE DECISION ON REMAND CONFLICTS WITH THIS COURT'S DECISION IN THIS CASE

The nation's system of jurisprudence is built upon the primacy of this Court. That primacy, in turn, requires that the lower federal courts follow this Court's mandates and apply its rulings. Where a lower court fails to do so,

this Court has ample power to compel compliance: "if a lower court 'mistakes or misconstrues the decree of this Court, and does not give full effect to the mandate, its action may be controlled . . . by a writ of mandamus to execute the mandate of this Court." *General Atomic Co. v. Felter*, 436 U.S. 493, 497 (1978); *see* R. Stern, E. Gressman and S. Shapiro, *Supreme Court Practice* 501 (6th ed. 1986) ("the Court has indicated that mandamus is the only proper remedy available to a party who has prevailed in the Supreme Court where the lower court . . . 'does not proceed to execute the mandate, or disobeys and mistakes its meaning' "). This Court should issue a writ of mandamus to compel the Ninth Circuit to follow its mandate in this case.

A. The Ninth Circuit Decision Does Not Give Effect To This Court's Holding That USA Petroleum Failed To Meet The Antitrust-Injury Test

The Ninth Circuit has to misconstrue this Court's holding just to find that this Court had left unresolved any issue for decision. It does so by describing this "Court's decision on the merits [as holding] that USA Petroleum *could suffer antitrust injury*, but only if ARCO's prices were predatory." 972 F.2d at 1073 (emphasis added). It also states that "the Supreme Court has held that USA *has standing* only to pursue a predatory pricing claim. . . ." *Id.* at 1074 (emphasis added).

Contrary to these statements, this Court's opinion nowhere suggested that USA Petroleum "could suffer antitrust injury" or "has standing" to pursue any Sherman Act §1 claim. Instead, this Court unequivocally disposed of USA Petroleum's claim that it had satisfied the antitrust-injury test. In the paragraph summarizing its holding, the Court's opinion provided: "We . . . hold that respondent has failed to meet the antitrust injury test in this case." 495 U.S. at 335. In the concluding paragraph of the opinion, the Court repeated: "Respondent has

failed to demonstrate that it has suffered any antitrust injury." 495 U.S. at 346. The holding that USA Petroleum had not demonstrated antitrust injury should have disposed of its Sherman Act §1 claim, because antitrust injury is an essential element of any private action under Sherman Act §1.

The Ninth Circuit purports to find the holding giving USA Petroleum's antitrust case new life in the following sentence: " '[a]lthough a vertical, maximum-price-fixing agreement is unlawful under §1 of the Sherman Act, it does not cause a competitor antitrust injury unless it results in predatory pricing.' " 972 F.2d at 1073, citing 495 U.S. at 339. This sentence does not support the Ninth Circuit's position. The sentence simply announced the standard against which this Court had measured USA Petroleum's showing on antitrust injury. USA Petroleum had failed to satisfy that standard. It had not even tried to prove predatory pricing when such a showing was required to oppose ARCO's summary judgment motion, allowing this Court (and the Ninth Circuit before it) to assume that ARCO's prices were nonpredatory. Nothing in this sentence granted USA Petroleum another shot at proving predatory pricing. Any doubt that this was so was eliminated by the Court's ultimate disposition that USA Petroleum "has failed to demonstrate that it has suffered any antitrust injury." 495 U.S. at 346.[6]

In these circumstances, the Ninth Circuit was not free to rule that USA Petroleum could satisfy the antitrust-injury test. " 'Whatever was before the Court, and is dis-

[6] The Ninth Circuit's reliance on the phrase "unless it results in predatory pricing" to allow USA Petroleum another chance to prove predatory pricing is suspect for another reason. As discussed at pp. 15-17 below, the part of the opinion surrounding this phrase, which the Ninth Circuit quotes out of context, shows that this Court's references to "predatory pricing" were to pricing in violation of Sherman Act § 2. It is undisputed, even now, that ARCO's pricing did not violate Sherman Act § 2 and therefore cannot be "predatory pricing" as this Court used that phrase.

posed of, is considered as finally settled.'" *NAACP v. Alabama*, 360 U.S. 240, 244-45 (1959). The *NAACP* opinion demonstrates that this principle applies even where, as here, the Court's disposition is based upon a premise it assumed rather than decided. In its initial decision in the *NAACP* case, the Court ruled that Alabama could not constitutionally order the NAACP to produce membership lists. Based upon that ruling, the Court held constitutionally impermissible a judgment of contempt against the NAACP for failing to comply with an order requiring production of documents including the lists. The lower court decided on remand that it could re-examine the judgment of contempt because a "premise" underlying the Court's disposition—that the NAACP had "complied satisfactorily with the production order, except for the membership lists"—was mistaken. *Id.* at 243. The Court again reversed, holding that the attack on the premise came too late. *Id.* The Court noted that the respondent had accepted the premise in its statement of the issue presented and had not sought from this Court a rehearing or clarification on the ground that the decision was based on a mistaken premise. *Id.*

Similarly here, this Court disposed of the issue whether USA Petroleum satisfied the antitrust-injury test on the "premise" that ARCO's prices were nonpredatory, and USA Petroleum accepted that premise in its statement of the issue presented. Nor did USA Petroleum seek rehearing or clarification from this Court. So too should USA Petroleum now be bound by this Court's disposition against it of the antitrust-injury issue.

B. The Ninth Circuit Decision Does Not Give Effect To This Court's Statements That Antitrust Injury In A Sherman Act § 1 Case Can Be Inflicted On A Competitor Only By Pricing That Is Predatory Under Sherman Act § 2

After erroneously determining that this Court's opinion allowed it to review the merits of USA Petroleum's argument, the Ninth Circuit compounds that error by ignoring this Court's clear statements that a competitor-plaintiff in a §1 case can satisfy the antitrust-injury test only by proving predatory pricing in violation of §2.

USA Petroleum argued to the Ninth Circuit, as it had argued to this Court, that sections 1 and 2 of the Sherman Act are so different that §2 standards, such as dangerous probability of monopolization, have no place in a §1 case. The decision on remand accepts that argument:

> "To require such a showing would be tantamount to saying that a conspiracy to predate violates section 1 only if it also violates section 2. Such a holding would in essence abolish the long-standing rule that a predatory pricing conspiracy is illegal without regard to its actual or potential market effect."

972 F.2d at 1076. The decision not to require USA Petroleum to meet §2 predatory pricing standards runs afoul of this Court's opinion in two respects.[7]

Most egregiously, this Court explicitly had rejected the very same argument from USA Petroleum that the Ninth Circuit now accepts:

> "Respondent further argues that it is inappropriate to require a showing of predatory pricing before anti-

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[7] The idea that a price can be predatory "without regard to its actual or potential market effect" is also inconsistent with this Court's opinions in *Matsushita Electric Industrial Co. v. Zenith Radio Corp.*, 475 U.S. 574 (1986), and *Cargill, Inc. v. Monfort of Colorado, Inc.*, 479 U.S. 104 (1986), and their progeny in the circuit courts (including *Liggett*).

> trust injury can be established when the asserted violation is an agreement in restraint of trade illegal under §1 of the Sherman Act, rather than an attempt to monopolize prohibited by §2. USA Petroleum notes that the two sections of the Act are quite different . . . . *In sum, respondent maintains that it has suffered antitrust injury even if petitioner's pricing was not predatory under §2 of the Sherman Act. We reject respondent's argument.*"

495 U.S. at 338-39 (emphasis added).

The conclusion on remand that the "fundamental distinction" (972 F.2d at 1074) between §2 and §1 precludes applying the §2 standard of dangerous probability of monopolization to a §1 claim is in direct conflict with the quoted language from this Court's opinion. This Court's "reject[ion]" of USA Petroleum's argument shows that a price can be "predatory" only if it is so under §2. Similarly, the footnote appended to the sentence where this Court notes that "only predatory pricing has the requisite anticompetitive effect" to inflict antitrust injury confirms the Court's understanding that a price cannot be predatory for purposes of inflicting antitrust injury on a competitor in a §1 case unless it also could be challenged under §2:

> "But because a firm always is able to challenge directly a rival's pricing as predatory, there is no reason to dispense with the antitrust injury requirement in an action by a competitor against a vertical agreement."

Id. at 339 n.9.

In direct conflict with this Court's statement, the decision on remand effectively dispenses with the antitrust-injury requirement. The remand decision permits a firm to challenge its rival's pricing under §1 when it could not directly challenge that pricing as predatory under §2. It accomplishes this result by confusing the distinct concepts of violation and antitrust injury. This confusion is

the second respect in which the decision on remand conflicts with this Court's opinion.

Section IV of the opinion on remand ignores antitrust injury and proceeds as though ARCO had contended that predatory pricing is an element of a §1 violation rather than part of the antitrust-injury test. The Ninth Circuit states that "[t]o rule in ARCO's favor in this case would require us to conclude that agreements to set predatory prices are not *illegal* unless dangerous probability is proven." 972 F.2d at 1076 n.6 (emphasis added). No such conclusion is required and ARCO never has contended that a dangerous probability of monopoly is required to make an agreement to fix prices illegal under §1. Such an agreement is *per se* illegal. But, the illegality of the agreement, whether *per se* or under the rule of reason, does not control the antitrust-injury issue. Indeed, this Court acknowledged that the need to show antitrust injury "is at least as great under the *per se* rule as under the rule of reason." 495 U.S. at 344. This Court also quoted Professors Areeda and Hovenkamp to the effect that " 'proof of a *per se* violation and of antitrust injury are distinct matters that must be shown independently.' " *Id.* The Ninth Circuit, however, once again overlooks this distinctness (and this Court's mandate) and repeats its error of confusing antitrust injury with illegality.

CONCLUSION

For the foregoing reasons, a writ of mandamus should issue to compel the Ninth Circuit and Judges Nelson and Reinhardt to follow this Court's mandate.

Respectfully submitted,

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